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# Preconstitutional Rule

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# Preconstitutional Rules

RICHARD S. KAY\*

*We are what we pretend to be, so we must be careful  
about what we pretend to be.<sup>1</sup>*

*Kurt Vonnegut, Jr.*

American constitutional law is founded upon a paradox. Constitutions exist so that the activities of government may be defined, and therefore limited, by law. To make those legal limits effective, they must be interpreted and applied by an independent and authoritative Supreme Court. But the Court is also an agency of government, and, as the final interpreter of the constitutional rules, its authority is without enforceable legal limits. Thus, to assure limited government, a locus of possibly unlimited government power has been created.

It is not surprising that theoretical constitutional law scholarship has focused, in large measure, on ways to define and control the institution of judicial review. The problem is complicated by the recognition that, like any center of great power, the Court may exercise, and has exercised, its authority to both good and ill effects. Academic efforts have, therefore, attempted to prescribe “models” of review which preserve and strengthen the Court’s ability to contribute to society’s well-being while reducing the possibility of interference in areas where the participation of the judiciary adds nothing to or subverts more appropriate methods of public decisionmaking. The two books whose publication provides the occasion for this Symposium are in this broad tradition of scholarship. Professor Choper asks what is “the proper role of the Supreme Court in our representative democracy when the Court engages in constitutional adjudication”?<sup>2</sup> Professor Ely offers a suggestion by which the “dominant mode [of noninterpretivist judicial review] can be improved upon . . . .”<sup>3</sup> This language indicates that these authors are engaged, not in description, but in argument. But argument is a useful exercise only if there exists, at some level, an intellectual universe defined by shared assumptions and terms of description in which the merits or defects of the arguments may be evaluated.

But it is a matter of some doubt whether such a universe exists, and, if it

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\* Professor of Law, University of Connecticut School of Law. I have been the beneficiary of useful discussions with, and suggestions by, a number of my colleagues at the University of Connecticut School of Law. Hugh MacGill has been particularly generous.

1. K. VONNEGUT, *MOTHER NIGHT* v (1979).

2. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 1 (1980) [hereinafter cited as CHOPER].

3. J. ELY, *DEMOCRACY AND DISTRUST* 41 (1980) [hereinafter cited as ELY]. “Non-interpretivist” judicial review refers to a model of judicial behavior in which the Supreme Court determines the validity of government actions, at least in part, by reference to criteria not derived or inferable from the text of the Constitution. *See id.* at 1.

does, what its characteristics are. The implicit background against which theoretical constitutional debate is conducted seems to me to have received inadequate attention. The appearance of these two distinguished works of constitutional commentary presents an appropriate opportunity to reconsider the nature of constitutional argumentation.

# I.

H. L. A. Hart has provided several concepts that illuminate both the nature of a standard for constitutional law criticism and the relationship to such a standard of the duty and authority of the Supreme Court. He has argued that in every legal system there exists a "rule of recognition [which provides] the criteria by which the validity of other rules of the system is assessed . . . ."<sup>4</sup> Such a rule acquires its status by the "acceptance" of the society whose legal system it governs. This acceptance involves the existence of a "critical reflective attitude" toward the rule, which manifests itself in regular criticism of departures from it. This attitude must be held by the officials of the legal system. It is sufficient if private citizens generally obey the rules that are valid under that rule of recognition which is so accepted.<sup>5</sup> Such an attitude, and therefore the rule of recognition itself, is thus a consequence of the habits and understanding of the members of society. In the United States, such a rule would provide the reference for deciding disputed questions as to the legal validity of acts of the government, that is, for determinations of constitutionality.

It would be easy to conclude that the rule of recognition coincides with the written constitution.<sup>6</sup> Such an assumption fits naturally with what is conceded to be the orthodox understanding of constitutional law, that expounded in and exemplified by the founding case of *Marbury v. Madison*.<sup>7</sup> On this view the written Constitution itself defines the legitimate functions of government. When actions of the government are challenged, it is the duty of

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4. H. HART, THE CONCEPT OF LAW 102 (1961). For example, a simple legal system may provide that whatever the King enacts is law, or in a more complicated system, that what the King in Parliament enacts is law. Such a rule is a "secondary rule" which, in contrast to a "primary" rule which requires conduct, is a "power-conferring" rule leading "to the creation or variation of duties or obligations." As such, it provides the authorization for the promulgation of constitutional rules (both primary and secondary) which directly define and limit the government. *Id.* at 27-32, 79, 91-93. I recognize of course that the utility of the concept of a rule of recognition has been the subject of considerable academic discussion. See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY 46-68 (1977). For reasons which would be beyond the reasonable scope of this essay, however, I continue to find Hart's analysis powerful and enlightening. The attempt to introduce into the definition of the rule of recognition some prior impersonal limitation raises the complications which are the subject of this essay.

5. *Id.* at 55-56, 110-14.

6. Hart himself, however, appears to recognize this distinction but assumes that the value of recognition in the United States legal system specifies the "clauses of its constitution [as] a supreme criterion of validity." See H. HART, THE CONCEPT OF LAW 103 (1961). Of course it is possible for there to be a rule of recognition which places almost exclusive emphasis on a constitutional text, see text accompanying notes 35-41 *infra*, but that is not obviously the case in the United States, even granting the creative possibilities of constitutional interpretation. See HART, *supra*, at 4.

7. 5 U.S. (1 Cranch) 137 (1803).

a court to measure the actions against the written rules and to announce whether those rules have been violated. This model postulates a rule of recognition that is both unchanging and impersonal, a "government of laws and not men."<sup>8</sup>

But skeptics of this description of constitutionalism have a long tradition. The constitutional language invoked is often far from clear, and the Supreme Court, which is charged with applying the rule, is, as a matter of law, practically beyond correction. The result, the skeptics (who can conveniently, if somewhat crudely, be termed legal realists,<sup>9</sup> argue, is not the "rule of law" but the "rule of the justices." In fact, the results (although not the rhetoric) of constitutional adjudication over the course of our national history appear to support this realist cynicism as to any substantial controlling force of the text in important sectors of constitutional law.<sup>10</sup> Moreover, the decisions of the Supreme Court that, in determining the validity or invalidity of government actions, omit reference to or inference from the textual rules are still broadly accepted as authoritative statements of law. That being the case, the rule of recognition must necessarily contain elements other than a direction to consult the written Constitution. The rule of recognition itself dictates the nature and amount of influence the constitutional text should have in the determination of the validity of acts of government. It is antecedent to the actual constitutional rules applied, whether those rules are written or unwritten, and may properly be called a preconstitutional rule.

I use the term "preconstitutional rule" as the equivalent of Hart's rule of

8. MASS. CONST. pt. 1, art. 30. This understanding of judicial review was for a long time so self-evident as to require no name. See Machen, *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 203 (1900). Now it has been given many: interpretivism, textualism, originalism, and intentionalism are some. See ELY, *supra* note 3, at 1 & n.\*; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204 (1980).

9. The legal realists, who flourished in the middle of the twentieth century, may generally be associated with a position disparaging the impact of abstract legal rules on legal decisionmaking. An extreme version of this view is found in the early work of Jerome Frank. See J. FRANK, *LAW AND THE MODERN MIND* 140-49 (1963) (1st ed. 1930). Of course, the realists were a diverse group and individuals among them expressed different attitudes at different times. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 70-83 (1973). But with respect to constitutional law, they were united by scorn for the idea that the rules of the constitutional text were the critical factor in constitutional adjudication. This understanding they associated at best with self-deception and, at worst, with deceit. Karl Llewellyn, in an unusual foray into constitutional law, gibed that the orthodox theory's hold was maintained "[o]nly because the Supreme Court has been so good at three-card monte . . ." Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 17 (1934). See generally F. RODELL, *NINE MEN* (1955); Lerner, *The Supreme Court and American Capitalism*, 42 YALE L. J. 668 (1933). An insightful discussion of the relationship of legal realism to modern constitutional jurisprudence is Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972).

This tradition of constitutional law criticism is, of course, far older than the realists. Long ago, Bishop Hoadley put the position succinctly in his often quoted claim that "[w]hoever hath an *absolute authority* to interpret any written or spoken laws, it is *he* who is the lawgiver to all intents and purposes, and not the person who first wrote or spake them." Quoted in J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 102 (1972). See also C. TIEDMANN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (1890); Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHIL. 645 (1918).

10. Critics of all persuasions seem to agree that the Supreme Court has substantially departed from any reasonable interpretation of the drafters' intentions, at least in important areas of constitutional law. E.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205 (1980); Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

recognition in the specific context of American judicial review.<sup>11</sup> The preconstitutional rule states the way the Supreme Court should determine the criteria of validity of government actions—the way it is to determine the constitutional rules. The distinction between preconstitutional rules and constitutional rules is important. A preconstitutional rule might be: “Use as the criteria for validity of government action those rules found in the 1787 Constitution as amended except insofar as those rules would invalidate measures which are necessary to prevent a national disaster.” Given this preconstitutional rule one might come up with either a constitutional rule that makes invalid all governmental acts impairing private contracts, or a rule that generally upholds significant classes of contract impairment legislation. The proviso at the end of the preconstitutional rule might make either an appropriate constitutional rule, depending on the Court’s judgment concerning the nature and imminence of a national disaster. Critics may find fault with the constitutional rule in each case while tacitly accepting the preconstitutional rule.

It follows that there are at least two kinds of criticism of judicial review. First, as in the case just put, there may be criticism of the Court’s promulgation of particular constitutional rules under a preconstitutional rule that is itself unchallenged. This would amount to an argument that the preconstitutional rule has been violated or misapplied. Second, on a different level, there may be criticism of the preconstitutional rule itself as an imperfect technique of limited government and argument that an altered rule, perhaps according a greater (or lesser) influence to the constitutional text, is preferable. Each of these kinds of criticism requires further explanation.

First, in considering the nature of criticism of the Court for departing from the preconstitutional rule, one must contend with the legal finality of the Supreme Court’s interpretations of that rule. Criticism on this level may proceed only if we separate two analytically distinct questions. The first is: What is the proper method for determining criteria of validity in the legal system—that is, what is the preconstitutional rule? The second is: Who administers the preconstitutional rule, applying it, interpreting it, and conclusively announcing the criteria of validity derived from it?<sup>12</sup> With regard to the second question, I am taking as given the ordinarily unquestioned institutional arrangements by which the Supreme Court’s conclusions are final on issues of

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11. I thus take as given the institution of judicial review by the Supreme Court in discussing proposals for preconstitutional rules, as well as in describing some existing rule. As an abstract matter, a rule of recognition does not presuppose any particular institutional arrangements. See note 12 *infra*.

12. Hart recognizes that intimately connected to the rule of recognition are other secondary rules that specify the conditions by which courts may “make authoritative determinations of the fact that a rule has been broken.” These “rules of adjudication,” in a sense, also specify a rule of recognition. H. HART, *THE CONCEPT OF LAW* 94–95 (1961). But he also makes clear that the rules of adjudication cannot subsume an independent rule of recognition even when they vest final adjudicative authority in some court. See text accompanying note 14 *infra*. It would certainly be possible for there to be controversy on the question of who authoritatively determines validity as well as on what the criteria for validity ought to be, although in the United States this question is largely in our constitutional past. For an interesting discussion of this distinction see Levinson, “*The Constitution*” in *American Civil Religion*, 1979 SUP. CT. REV. 123.

constitutionality. Hart has shown, however, that this assumption does not render the first question insignificant. The finality of judicial review does not make it definitionally the case that the preconstitutional rule is: "The criteria of validity are what the Supreme Court says they are."<sup>13</sup> Consider the rules of a game that is first played without any officials. The established rules are not automatically altered by the introduction of an official scorer, even if that scorer's decisions are to be treated as conclusive. The game has not been changed to one in which "the score is what the scorer says it is." Unofficial statements about the score would still be something more than a prediction of the scorer's announcement. Both official and unofficial statements of the score are reasonably thought to be conclusions drawn from an application of the same impersonal scoring rule. This will be true although these statements may, on occasion, differ and although only the scorer's statement has any operative effect.<sup>14</sup> In the same way, we may have an abstract standard for determining the validity of government actions that is logically independent of the Supreme Court's decisions, notwithstanding the fact that only the Court's constructions of that standard can have any juridical effect. Indeed, it is only the existence of such a standard that makes sensible the constant stream of conventional legal criticism of the Supreme Court's constitutional decisions.<sup>15</sup>

Second, criticism of the preconstitutional rule itself points up the distinction between the content of the rule as a subject for factual investigation and as a subject for normative argument.<sup>16</sup> Hart is primarily interested in showing the fact of the existence of a rule of recognition as an indispensable element of a legal system. At any moment there presumably exists a fairly well-defined preconstitutional rule that, in fact, governs constitutional adjudication. Since the rule is a function of the conscious acceptance of officials—here, most crucially, the judges—and the acquiescence of the general population, a social scientist may be able to discover the rule by empirical investigation of the behavior and attitudes of such participants in the legal system.<sup>17</sup> But it is also possible to consider a legal system's preconstitutional rule in critical, evalua-

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13. Compare Chief Justice Hughes' famous comment that "the constitution is what the judges say it is." Quoted in H. HART, *THE CONCEPT OF LAW* 250 (1961).

14. See *id.* at 138-40. Hart acknowledges there may be some sort of a game in which the only rule is that the score is what the scorer says it is. Such a game might be called "scorer's discretion" and "some amusement might be found in playing it if the scorer's discretion were exercised with some regularity . . ." *Id.* at 139. Similarly there might be a preconstitutional rule analogous to "scorer's discretion" in which valid law is what the Supreme Court says it is. See text accompanying notes 44-45 *infra*.

15. See H. HART, *THE CONCEPT OF LAW* 142-44 (1961). Of course, it is difficult to imagine a game in which a scorer might be accorded the degree of creative discretion which a judge is to exercise under some versions of a preconstitutional rule. See *id.* at 141, and text accompanying notes 37-38 *infra*.

16. See *id.* at 104-05.

17. See text accompanying note 5 *supra*. Whether there is such a single rule is a question of fact. I assume this is the case but do not defend that assumption here. See note 68 *infra*. The alternative is that constitutional adjudication proceeds by aggregating the results of applying each judge's version of a preconstitutional rule, that is, by the equivalent of a collective whim of the Justices. This is, of course, possible. The balance of the argument of this essay would not become thereby irrelevant. It would still be possible to argue that there *ought* to be such a rule and what the characteristics of such a rule ought to be. The prospects of such a rule ever being of any practical importance, however, would be minimal.

tive terms. Given the needs and tastes of this society, is the existing preconstitutional rule a good one? And if it is not, what *ought* the preconstitutional rule be?

Although such critical discussion of the preconstitutional rule might be justified solely on the grounds that it makes clearer the existing basis of the legal system, it will ordinarily assume that it is possible for the preconstitutional rule to change. Such discussion will normally presume that one way or another, a legal system's preconstitutional rule is a question of choice. One cannot reasonably argue that the official attitudes, particularly those of the judges, which are essential to the establishment of a preconstitutional rule, are jointly and consciously selected at particular times. A written constitution may be "chosen" in this fashion but the preconstitutional rule that dictates how it is to be used most likely must arise in a gradual "Burkean" fashion, reflecting a complex of social factors.<sup>18</sup> But the improbability of conscious choice does not mean that the preconstitutional rule is not something that can profitably be discussed, analyzed, and criticized. Such activity is futile only if one adopts a rigidly determinist outlook of one sort or another. If one believes, instead, that our ideas about the right or wrong of legal practices and institutions may critically, albeit indirectly, influence the development of those practices and institutions, it would seem an acceptable convention to speak *as if* the preconstitutional rule were a matter of conscious choice.<sup>19</sup>

Normative appraisal of the merits or flaws of a preconstitutional rule and its alternatives must be distinguished from discussions of the validity of the preconstitutional rule. Hart points out that, since the rule of recognition is defined as the ultimate reference for criteria of legal validity, it makes no sense to talk of the rule itself as valid or invalid. Validity is a concept that has meaning only from a viewpoint *internal* to the legal system. Since the preconstitutional rule essentially defines that system it can only be evaluated from an *external* viewpoint.<sup>20</sup>

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18. The preconstitutional rule is therefore analogous to the lower-case usage of constitution that is commonly used to refer to fundamental governmental principles. It is this sense of constitution of which Joseph deMaistre said (speaking particularly of the British constitution):

Certainly it has not been made a priori. Never have statesmen gathered together and said: *Let us create these powers, balance them in such and such a manner, and so on*: No one has thought this. The Constitution is the work of circumstances, and the number of circumstances is infinite.

J. DEMAISTRE, *Essay on the Generative Principles of Political Constitutions*, in THE WORKS OF JOSEPH DEMAISTRE 147, 152 (J. Lively ed. 1965) (emphasis in original). See E. CORWIN, *Constitution v. Constitutional Theory*, in AMERICAN CONSTITUTIONAL HISTORY 99 (1964).

19. The difference of opinion mentioned in the text suggests an intellectual argument that obviously cannot be summarized here. With respect to the narrower question of the autonomy of legal doctrine see generally L. POSPICIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 127-92 (1971) (surveying theories of change in legal systems). Cf. G. E. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980) (arguing that academic writing has influenced the development of tort rules). A recent summary is Feinman, Book Review, 78 MICH. L. REV. 722 (1980). My own position is stated briefly, although not defended, in Section III below. See also note 71 *infra*, concerning the possibility of sufficient tacit agreement on values in society to make possible any stable preconstitutional rule.

20. When a social group has certain rules of conduct, this fact offers an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the "external" and the "internal points of view."



When we move from saying that a particular enactment is valid, because it satisfies the rule [that] what the Queen in Parliament enacts is law, to saying that in England the last rule is used by courts, officials, and private persons as the ultimate rule of recognition, we have moved from an internal statement of law asserting the validity of a rule of the system to an external statement of fact which an observer of the system might make even if he did not accept it. So too when we move from the statement that a particular enactment is valid, to the statement that the rule of recognition of the system is an excellent one and the system based on it is one worthy of support, we have moved from a statement of legal validity to a statement of value.<sup>21</sup>

It should be clear, then, that when we argue about the way in which the Supreme Court ought to use the constitutional text and other factors in its adjudication, we are arguing about the "correctness" of a particular preconstitutional rule. For the reasons stated, such discussion is not about the proper application of an accepted standard of legal validity, but about what that standard should be. We are therefore necessarily outside the realm of conventional legal discourse. Our use of the term "ought" in this context must have reference to nonlegal criteria, to our basic political, moral, or aesthetic convictions.<sup>22</sup>

Even though arguments for or against a preconstitutional rule are necessarily extralegal, it is crucial to recall that the office of such a rule is to specify criteria of validity that are to be accepted as binding, that is, as law. We can debate the wisdom of a preconstitutional rule only from the external viewpoint, but to *be* a preconstitutional rule it must be accepted from the internal viewpoint.<sup>23</sup> To fail to understand the internal dimension of the preconstitutional rules is to miss a critical aspect of the legal system. Still, when we are speaking in terms of an existing or a proposed preconstitutional rule, we are speaking of nothing more or less than an artificial intellectual construct that public officials, here the Justices of the United States Supreme Court, use to determine the criteria for separating the valid from the invalid among challenged actions of government. We are speaking of an idea about the proper reach and organization of the power of the state.

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H. HART, *THE CONCEPT OF LAW* 86 (1961). See *id.* at 103-07; Mandel, *Dworkin, Hart and the Problem of Theoretical Perspective*, 14 *LAW & SOC'Y REV.* 57, 59-66 (1979); Wade, *The Basis of Legal Sovereignty*, 1955 *CAMBRIDGE. L.J.* 172, 187-97.

21. H. HART, *THE CONCEPT OF LAW* 104-05 (1961).

22. Thus it is anomalous to argue, for example, that recourse to the intention of the Framers of the Constitution is required because such adjudication is itself constitutionally required and the requirement is demonstrated from a review of the Framers' intention. Cf. Jones, *The Brooding Omnipresence of Constitutional Law*, 4 *VT. L. REV.* 1, 27 (1979); Levinson, "The Constitution" in *American Civil Religion*, 1979 *SUP. CT. REV.* 123, 137. The analysis in the text reveals that one may quite reasonably argue for adhering to the Framers' understanding of the Constitution even in the face of evidence that they intended otherwise.

23. Such acceptance as binding, of course, does not mean that even the persons who so view it must believe it to be morally or politically a *good* rule. However, a persistent divergence between the character of the accepted preconstitutional rule and the moral principles of those who accept will, no doubt, eventually undermine its acceptance. See T. MORAWETZ, *THE PHILOSOPHY OF LAW* 26-27 (1980).

## II.

Given this analytic framework, it is possible to recast, somewhat more clearly, the essential questions argued by modern constitutional scholarship. Such argument necessarily proceeds on two levels corresponding to the internal and external viewpoints. Much conventional constitutional law writing criticizes and analyzes the work of the Supreme Court in terms of its consistency with the purpose of the constitutional provisions invoked, prior case law, sound public policy, and the correct institutional role of the Court.<sup>24</sup> But to a great degree, this writing takes for granted the propriety of these factors and the weight they ought to have in the underlying preconstitutional rule. It does not overtly consider the desirability of that assumed rule. A growing body of literature, however, examines, at least in part, and in a rather explicit way, these fundamental questions of the political organization and authority of both the government as a whole and of the Supreme Court.<sup>25</sup>

The new contributions by Professors Ely and Choper certainly fall into this category. Ely proposes that the Court, in addition to enforcing clear textual restrictions, ensure that the government remain democratically responsive by policing strictly the regulation of the franchise, by prohibiting certain kinds of interference with free expression, and by correcting the misallocation of public benefits and burdens that can result from the structural and systematic underrepresentation of certain groups.<sup>26</sup> The insistence on this kind of activity is premised, at least in significant part, on arguments not rooted in any understanding of the constitutional text.<sup>27</sup> But assigning to the Court the task of protecting any other non-text-based values is disparaged.<sup>28</sup> Ely's choices in this regard are not based on any presumptively authoritative legal criteria,<sup>29</sup> but on an explicit political preference for democratic decision-making.<sup>30</sup> Similarly, Choper calls on the Court to decline to decide cases involving the limits of federal power relative to that of the states or cases involving the limits on the power of the branches of the federal government with respect to each other. He defends this view on the grounds that the constitutional values of separation of powers and federalism are already

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24. The paradigm for this kind of constitutional law writing is probably the annual review of cases decided by the Supreme Court in the previous term published in each November issue of the *Harvard Law Review*.

25. E.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1977); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L.L. REV. 117 (1978); Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269 (1975).

26. See ELY, *supra* note 3, at 73-179.

27. See *id.* at 101-04.

28. See *id.* at 43-72.

29. There is some ambiguity in Professor Ely's book concerning the nature of his argument. While he proposes an alternative to both interpretivist and noninterpretivist models, he premises his argument, in substantial part, upon a reading of the Constitution. That this reference is deemed necessary may indicate a justification by recourse to an already accepted preconstitutional rule that emphasizes the critical nature of the constitutional text in determining validity. In reviewing Ely's book, I have discussed this matter at somewhat greater length. See Kay, *Book Review*, 13 CONN. L. REV. \_\_\_\_\_ (1980).

30. See ELY, *supra* note 3, at 4-8, 101-04.

largely protected by the institutional structures of the government and that such abdication will protect the Court's capacity to deal with issues of individual rights.<sup>31</sup> But here too this preference for the protection of certain values over others does not respond to a strictly legal question.<sup>32</sup> In each case, these authors are engaged in a critical analysis of the preconstitutional rule—suggesting changes in it and refinements to it. Argument on this level cannot proceed by reference to any settled legal standards since that standard is the subject of the discussion. The justifications for these kinds of proposals must be external to the legal system and in terms of general morality, political theory, and aesthetic preference.<sup>33</sup>

We can see more clearly how such argument proceeds and the kinds of considerations that are relevant in appraising it by considering two opposing characteristics that a preconstitutional rule may possess. To the extent that a preconstitutional rule is "closed," it will specify strictly, and in advance, the criteria for legal validity. On the other hand, a rule will be "open" to the extent that it leaves unresolved possible future issues of validity.<sup>34</sup> To illustrate this opposition we can examine two extreme, if familiar, candidates for acceptance as the preconstitutional rule, one illustrating a radically closed version, the other an equally open one. I do not suppose there is anyone who seriously and exclusively advocates either model, but their drastic simplicity helps demonstrate the kinds of factors that count in choosing a preconstitutional rule.

The very closed rule is a limited version of the formula of *Marbury v. Madison*:<sup>35</sup> "Properly promulgated government acts are valid only insofar as

31. See CHOPER, *supra* note 2, at 175-378.

32. Professor Choper describes his effort in modest language, claiming to deal only with the jurisdictional as opposed to substantive role of the Court. See CHOPER, *supra* note 2, at 1. It is true that within the area Choper denotes as "Individual Rights" he does not discuss the criteria for validity of government action. But in major parts of what has been traditionally deemed the realm of constitutional law—the power of the federal government relative to the states and of the branches of the federal government relative to each other—by calling on the Court to refrain from decision he implicitly sets out a criterion for at least enforceable legal validity. So far as the Court is concerned, all exercises of such governmental power are to be treated as if they were valid. His arguments for this position are arguments for a preconstitutional rule. They are extralegal. See, e.g., *id.* at 220-21, 285.

33. Argument concerning the content of the preconstitutional rule may take place *within* the context of constitutional adjudication. Hart states that, like every rule, the rule of recognition must have an area of open texture in which the application of the rule is not self-evident and some judicial creativity is called for. See H. HART, *THE CONCEPT OF LAW* 146-50 (1961). The extent to which courts should feel constrained in exercising this power is a separate question. See Morawetz, *The Rules of Law and the Point of Law*, 121 U. PA. L. REV. 859 (1973). The discussion in this essay may be understood as one about the amount of open texture which is appropriate in a preconstitutional rule.

34. Although different in significant ways and employed for a different purpose, this distinction owes much to that between open and closed practices used by my colleague, Thomas Morawetz in Morawetz, *The Rules of Law and the Point of Law*, 121 U. PA. L. REV. 859 (1973). Professor Levinson makes a similar division between those seeing the source of doctrine as inhering exclusively in the text and those who regard as authoritative both the text and an unwritten tradition. Analogizing these positions to Christian differences on the role of scripture he labels the former view "Protestant" and the latter "Catholic." See Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123, 132-36.

35. 5 U.S. (1 Cranch) 137 (1803). *Marbury* itself cannot reasonably be understood as standing for the very closed rule hypothesized since, although the decision is closely tied to the constitutional text, it clearly recognized that constitutional rules may be implied by the textual provisions as well as explicitly stated there. That was certainly the case with the limitation on the original jurisdiction of the Supreme Court applied in that case.

they are authorized by a particular and explicit grant of power contained in the text of Constitution and if they do not contravene any explicit prohibition found within the text.<sup>36</sup> The language of the written constitution's provisions, moreover, is to be understood in exactly the sense intended by those who wrote, proposed, and ratified it without reference to any changed circumstances."<sup>37</sup>

This rule, of course, is a narrow application of what continues to be the orthodox constitutional theory, generally espoused by the Court itself. It is most familiar when stated from the internal viewpoint.<sup>38</sup> It is here considered from the *external* viewpoint as a possibly good or bad basis upon which to establish a legal system. There is, *a priori*, no reason why such a closed rule based on the text could not be chosen, not because the document exerts any mystical binding power, but because we think proceeding as if its provisions were binding will, as a moral, political, or aesthetic matter, make for good government.<sup>39</sup>

But can it plausibly be argued on any of those grounds that a preconstitutional rule should be adopted that tests the validity of government actions according to unyielding criteria which were drafted for a different people, at a different time, addressed to different needs and problems? In fact, the preconstitutional rule described has substantial appeal, precisely because of its closed nature. An extremely closed rule meshes most comfortably with what is ordinarily conceded to be the animating purpose of the establishment of constitutional government—to limit the reach of public power.<sup>40</sup> Reference to an explicit and static set of written rules most sharply defines the extent of governmental authority.<sup>41</sup> This is not to say that even this very closed rule

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36. Closed constitutional rules may provide criteria of decision unrelated to any text. "The criteria of validity are those found in the 1787 text as amended except for acts of the legislature imposing taxes all of which will be found valid" would be a rule as closed as that described in the text. See note 45 *infra* and the discussion of the closed rule inferable from Choper's proposals.

37. The federal nature of American government necessarily adds some complications. The characterization in the text, applied to federal constitutional law, would be true only of the federal government. State government, as a matter of federal constitutional law, would, to the same extent, be unlimited except insofar as specific textual prohibitions were identified. Of course, the state government may be limited in the more comprehensive way by a state constitution.

38. See text accompanying notes 66-67 *infra* for a discussion of Justice Roberts' statement about the role of the Court. It is probably the case that most judges see the preconstitutional rule as almost exclusively directing reference to the constitutional text, but such judges differ on the nature of their duty of interpretation. Only rarely have nonacademics gone to the extreme of explicitly proposing a preconstitutional rule with a significant nontextual component.

39. See Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 844-45, 864-65 (1931); Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978). See also Berger, *The Scope of Judicial Review: A Continuing Dialogue*, 31 S. C. L. REV. 171 (1980) (arguing that the Court ought not to be entrusted with decisions at this level).

40. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 176-92 (1960). But see Jones, *The Brooding Omnipresence of Constitutional Law*, 4 VT. L. REV. 1, 2 (1979) (emphasizing the role of the Constitution in facilitating government activity).

41. This is not, however, to say that a government so limited will necessarily be a "weak" government. See text accompanying notes 47-48 *infra*.

would eliminate all uncertainty as to the propriety of government actions. But compared to most other alternatives, adherence to a written text, understood to have a meaning fixed at particular moments, is probably about the best human intelligence can provide.

But the problem with this approach is exactly that it works too well. To the extent that we do not fear the power of government, but fear instead its inability to fulfill our demands in solving new problems, an unchanging, rigid set of limits may get in the way.<sup>42</sup> The need to change the contours of governmental authority over time argues for a preconstitutional rule that incorporates flexibility and adaptability in defining and redefining the permissible scope of state power.

Flexibility is the outstanding characteristic of the alternative extreme candidate, a very open preconstitutional rule, cast in the following form: "Properly promulgated governmental actions are valid if the Supreme Court does not disapprove them." No criteria are specified for the Court to follow.<sup>43</sup> While the first rule reserves a predominant role for the constitutional text and reduces the job of the Justices of the Supreme Court to little more than that of administrators, the second rule eliminates any role for the text and elevates the importance of the unrestricted political judgment of the Justices of the Supreme Court. This rule would, again as a matter of preference, identify the preconstitutional rule with the final authority of the Supreme Court to construe and apply it. It would adopt as the basis of the legal system the proposition that "[t]he law (or the constitution) is what the courts say it is."<sup>44</sup>

As a normative position this preconstitutional rule also has a substantial attraction. This approach to determining legal validity of government action is most capable of yielding a set of government powers most responsive to the problems of changing times. Government could not, in any permanent sense, be barred from exercising any power that might, in some circumstances, promote the public welfare. Nor could it, in advance, be assured the legal capacity to act or to restrict private action when to do so might constitute a serious evil.

The difficulty here is just the opposite of that associated with the very closed rule. This rule might be termed "anticonstitutionalist" since it fails to place any knowable prior limits on government activity. Neither officials nor private persons could have fixed expectations of the boundaries of permissible public actions. There would be no legal definition of government as a

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42. This is a general characteristic of government by prior rules. See H. HART, *THE CONCEPT OF LAW* 124-27 (1961); Schochet, *Introduction: Constitutionalism, Liberalism, and the Study of Politics*, in XX NOMOS 1, 8 (1979). But the form of the rules may dictate how important this problem will be in practice.

43. From the special viewpoint of the Justices of the Supreme Court, this extreme version might not properly be called a "rule" at all since it imposes no restrictions on their discretion.

44. H. HART, *THE CONCEPT OF LAW* 138 (1961). This aphorism is attributed to Chief Justice Charles Evans Hughes. *Id.* at 250. A position very close to this, at least with respect to the broad clauses of the Constitution, is found in Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHIL. 645 (1918). A legal system with this preconstitutional rule would be analogous to what Hart calls a game of "scorer's discretion." See note 14 *supra*.

whole and consequently no meaningful internal criticism of the exercise of the Court's power.<sup>45</sup>

The choice between a more open or a more closed preconstitutional rule has important implications for the nature of the government defined under it. It is directly related to the extent to which government power is legally limited. As used here, however, the extent of legal limitation does not necessarily correlate with the legal breadth and potency of governmental power. The difference between open and closed rules goes to the clarity and certainty of constitutional limits. Sharply defined constitutional rules are logically compatible with a strong and far-reaching governmental power. Such clarity serves the purpose of those who generally fear government, but it does so in a particular way by giving the crucial assurance that there is a knowable and stable sphere of conduct immune from government regulation or prohibition.<sup>46</sup> Maitland put the point this way:

The exercise of power in ways which cannot be anticipated causes some of the greatest restraints, for restraint is most felt and therefore is greatest when it is least anticipated. We feel ourselves least free when we know that restraints may at any moment be placed on any of our actions, and yet we cannot anticipate these restraints . . . . Known general laws, however bad, interfere less with freedom than decisions based on no previously known rule.<sup>47</sup>

This is not the only way to restrain government, and it may not be a sufficient way. Obviously the substantive content of the preconstitutional rule will be of critical importance in effectuating desired limitations. But some stability and predictability seem to be necessary preconditions for the effectuation of any kind of limitation.<sup>48</sup>

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45. Of course, a legal system with such a preconstitutional rule would still be weaker than one in which there were no judicial review, because the authority of government would be divided and therefore harder to exercise. But this would not provide the special benefits of clear definition of government which can only be supplied by prior impersonal rules. See text accompanying notes 46-48 *infra*. The Court, under this rule, would perform a function similar to that envisioned for the Council of Revision which was rejected at the 1787 Convention. See *Board of Educ. v. Barnette*, 319 U.S. 624, 649-50 (1943) (Frankfurter J., dissenting).

The extremes of open and closed preconstitutional rules have been presented with respect to the role they give to the written Constitution in determining validity. But the same characteristics differentiate proposed preconstitutional rules that are either predominantly textual or nontextual. Thus, there may be agreement on complete reference of questions of validity to the text but disagreement on methods of interpretation. Compare R. BERGER, *GOVERNMENT BY JUDICIARY* 370-71 (1977) (constitutional language is to be read in the sense understood by the Framers), with R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 132-37 (1977) (Constitution should be construed with reference to concepts prescribed but not by any particular conceptions of those concepts held by the Framers). Similarly, in writing a constitution, a preference for a closed rule will reveal itself in a use of specific and detailed provisions instead of vague language. Nontextual preconstitutional rules may also be more or less open, depending on how many and how narrow are the nontextual values to which the Court is referred. In this sense, Professor Ely's specification of "representative democracy" seems to provide a more closed rule than Professor Wellington's reference to "conventional morality." See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265-311 (1973). See text accompanying notes 50-52 *infra*.

46. "The knowne certaintie of the law is the safetie of all," E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND*, (FIRST PART) 395 (1633), quoted in Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1416 (1979). See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 156-59, 208-09 (1960). But see Ritter, *The Anarchist Justification of Authority*, in XIX NOMOS 130 (1978).

47. Quoted in F. HAYEK, *THE CONSTITUTION OF LIBERTY* 449 (1960).

48. Of course, it is conceivable that we could have a preconstitutional rule that is quite closed but which declares *all* acts of government agencies as valid. (The rule of parliamentary supremacy may be such a rule.) And, on the other hand, an open rule at least presents some probability of actually limiting the government. At

This distinction between limited government and weak government explains what might otherwise appear an anomaly in the depiction of the two extreme prototypes of preconstitutional rules. For it portrays the proponent of strictly limited governmental power (the civil libertarian, perhaps) as favoring a closed preconstitutional rule, one which will shackle substantially the power of the Supreme Court. Yet, it is the Court to which opponents of governmental power have traditionally looked to check abuses of government. But the question of strict or flexible legal limitations must be applied to the government as a whole, and the Court is itself an agency of government. A relatively unrestrained Supreme Court *may* clash with the other branches, thus reducing the sum of government power. But the very lack of restraint makes this a matter of substantial speculation. The breadth of governmental power under an open preconstitutional rule rests largely within the discretion of the judges. It is exactly a refusal to trust the undefinable responses of public officials that animates the proponents of closed preconstitutional rules. So, in this respect, a government defined by an extremely open preconstitutional rule involves no necessary advance from one in which the direct power of government has no constitutional limitations at all. Rather, the ultimate decision on government action is merely transferred from one group to another. While we might trust the Court more than the other agencies of government, this is still an assurance of an entirely different kind from that implicit in faithful application of a closed preconstitutional rule. Reliable restraint is found only in subordinating personal judgments to predefined impersonal rules.

Between the two extreme preconstitutional rules described fall the innumerable suggestions of constitutional scholarship. These proposals are never as simple as the models put forward. They usually involve some compound of adherence to the intended meaning of the constitutional text and discretion to adjudicate in light of new situations. That part of the Court's authority which is without textual basis is, moreover, ordinarily further limited by some verbal formulae directing the Court to some broad values, or stipulating some method it should employ in exercising its judgment. Such non-text-based directives limit the Court's discretion, sometimes very generally, and sometimes rather strictly. Such a compound rule might call for adherence to the written text, except when relations with other nations are involved, in which case any joint action of the executive and legislature is valid. Or it might demand that valid acts both conform to the text *and* that they do not inhibit the growth of capital. But each proposed preconstitutional rule represents, in part, some compromise between the merits and flaws of the very open and very closed rules postulated.<sup>49</sup> In evaluating these proposals, we will be influenced by the extent to which those extreme rules attract or repel us. It

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this extreme there may be no increase in certainty supplied by the closed rule unless the legislature was somehow more predictable than the Court.

49. See note 64 *infra*.

may be useful, therefore, to examine at somewhat greater length the values and attitudes associated with those hypothetical positions.

It is necessary first to consider the one aspect of these arguments that has received the most attention in the academic commentary. This is the opposition between democratic and judicial decisionmaking. A closed preconstitutional rule is generally deemed more congenial to democracy because it is thought to leave intact the decisions of the politically accountable branches in instances when those decisions would be more vulnerable to invalidation under an open rule.<sup>50</sup> But it is not at all clear that this association is justified. First, there is some question whether the concept of democracy is so univocal as to support the assumption that the decisions of everyday legislation and executive action are better expressions of the popular will than the decisions of the drafters and ratifiers of the Constitution whose judgment governs in the most familiar closed rules—especially when combined with the fact that those decisions have not been altered by amendment.<sup>51</sup> Second, and more importantly, there is nothing inherent in a fairly open preconstitutional rule that requires greater interference with the decisions of the political branches than would occur under a more closed rule. All depends upon the substantive character of the open rule under discussion. For example, the “political question” doctrine is manifestly a nontextual device of constitutional adjudication, and, as it has evolved, provides very little in the way of advance guidance.<sup>52</sup> Such a doctrine could only be proper under a considerably open rule. But that doctrine serves to leave intact determinations by the other branches that might well be struck down under a closed rule founded on strict adherence to the constitutional text. The same conclusion is illustrated by the books of Professors Ely and Choper. Each proposes, in effect, a preconstitutional rule that is based, in each case, at least partially, on nontextual values.<sup>53</sup> But they are proposed, in large measure, for the express purpose of immunizing democratic decisionmaking from reversal by undemocratic judicial review.<sup>54</sup> Of

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50. This has become, more or less, an axiom of constitutional law scholarship (notwithstanding some attempts to show the contrary), with attention focused almost exclusively on those instances of non-text-based review which serve as a basis for striking down legislative acts. See, e.g., CHOPER, *supra* note 2, at 4–12; ELY, *supra* note 3, at 4–5.

51. Given the availability of amendment, constitutional rule may represent a democratic judgment that certain governmental decisions be made slowly and with an even wider basis of assent. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 178–82 (1960). It is not obvious that democratic government is identical with the cession of government power to exactly 50% plus one of the population, or that popular decisions be accomplished within any particular period of time. Professor Choper's extensive discussion of the relative responsiveness of the Supreme Court and other branches gives almost no attention to the relative claims of the legislature and the constitutional text to a democratic character. See CHOPER, *supra* note 2, at 29–59. In a regime under the hypothetical closed preconstitutional rule that comparison would be the critical issue.

52. See Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 548–49 (1966). In some incarnations the political question doctrine involves a demand that the Court leave certain decisions to those agencies of the government vested by a “textual commitment” with the power to make them. See *id.* at 538. If there were nothing more, the doctrine would be consistent with a closed text-based rule. Of course that is not the case. See Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 45–46 (1961).

53. See text accompanying notes 27–28 *supra*.

54. See CHOPER, *supra* note 2, at 55–59, 169–70. (Choper's position is perhaps better stated as preserving democratic decisionmaking in certain areas in order to prevent the hostility that would ensue from overruling such decisions from restricting judicial authority in the field of individual rights.) ELY, *supra* note 3, at 101–04.



course, certain versions of open preconstitutional rules would lead to more interference with democratic political control than a closed, text-based rule. But there is nothing automatic about such a result. In other words, there is no easy correlation between a general preference for open or closed preconstitutional rules and an attachment to democratic government.

More plainly involved in the choice between open and closed preconstitutional rules is one's preference, already adverted to, for either stability and certainty on the one hand, or for flexibility and adaptability on the other, in defining the powers of government. This preference, however, is usually just one manifestation of a more basic attitude toward the role of government in human affairs. In particular, it is a function of the breadth and number of the tasks that are assigned to government. If the state is understood to have the sole purpose of providing the effective preconditions for individual (or voluntary joint) actions, then the ability to rely on a more fixed definition of the government's power to upset the plans for such actions is critical.<sup>55</sup> In contrast, if government is the agent for accomplishing certain corporate objectives, the ability to achieve those objectives in light of changing circumstances will be frustrated by unyielding rules concerning the reach of public authority.<sup>56</sup> Moreover, the more broad and various are those social goals committed to government, the more difficult it will be to be content with a closed rule that defines in advance the capacities and limitations of government power. This will be so not only because we will want the government to be effective, but because, given the scope of its concerns, we may wish to allow the formulation of new limits on it to prevent the unforeseeable injuries it might inflict. At the extreme, to the extent we understand government as charged with the responsibility to do whatever the public welfare requires, we will demand an ongoing, changing process of definition, one more naturally accommodated by an open preconstitutional rule.

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55. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 139-47 (1960).

56. Michael Oakeshott has presented two analogies from Roman law which are useful in understanding the competing tendencies in the modern Western idea of the state. The idea, *societas*, unites its members not in an enterprise to pursue a common substantive purpose or to promote a common interest, but [in an association] of loyalty to one another, the conditions of which may achieve the formality denoted by the kindred word "legality". . . . It [is] a formal relationship in terms of rules, not a substantive relationship in terms of common action.

M. OAKESHOTT, *ON HUMAN CONDUCT* 201 (1975). A state understood in these terms is "a nomocracy whose laws are understood as conditions of conduct, not devices instrumental to the satisfaction of preferred wants." *Id.* at 203. In contrast the association labeled *universitas* is one

in respect of some identified common purpose, in pursuit of some acknowledged substantive end, or in the promotion of some specified enduring interest. . . . [A state organized on this principle may create] managerial offices whose occupants are authorized to make the decisions in which their joint purpose is pursued. . . . Government here may be said to be teleocratic, the management of a purposive concern.

*Id.* at 203, 205-06. The conception of the state necessarily is critical in the understanding of the role of law. It may be "a system of prescriptive conditions, indifferent (and not merely impartial) to the satisfaction of wants, to be subscribed to in making choices about what to do or say," or it may be "a set of prudential managerial conclusions specifying a common purpose and the manner in which this purpose shall be contingently pursued."

*Id.* at 231. Except in the case of the most simple and modest common pursuits, the latter understanding of law is more consistent with a test of validity represented by an open preconstitutional rule. This becomes more probable as the substantive objectives of the state expand in scope and complexity. See also Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1371 (1979); Schochet, *Introduction: Constitutionalism, Liberalism, and the Study of Politics*, in XX NOMOS 4-5, 7-8 (1979).

The choice between concepts of government will largely turn on evaluation of the capacity of any public authority to accomplish the kinds of objectives that might be set for it. It will also turn critically on one's estimate of the likelihood that government may produce more evil than good in the pursuit of those ends. The choice involves a trade-off between our expectation of benefit and our willingness to risk injury. One who is highly skeptical of the ability of the state to accomplish useful goals and is, at the same time, highly fearful of the abuses to which such power is prone will seek to mark off the assigned tasks and available means strictly, and in advance, by a closed preconstitutional rule.<sup>57</sup> An optimist as to government's tendency to beneficence will wish to accord it the greater flexibility of an open rule.<sup>58</sup> The inclination toward one side or the other of this range of outlooks will depend not only on one's understanding of the facts of the history of government, but also on one's personal affinity for risk-taking or caution.

But for most people, government restraint and government activity are both to be desired in proper measure.<sup>59</sup> Consequently, a preconstitutional rule will emerge that will compromise those interests in one of the several ways that have been mentioned. The proposals of Professors Ely and Choper are examples of the different ways in which that compromise might be struck. Choper suggests that the Court refuse to invalidate exercises of the power of the federal government even if they can be shown to invade an area reserved to the state governments by the Constitution.<sup>60</sup> Although it ignores textual proscriptions, the proposal provides criteria of validity which, in this area at least, are quite definite: all such federal action is to be treated as valid.<sup>61</sup> This is best characterized as a closed preconstitutional rule. Professor Ely, on the

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57. See Schochet, *Introduction: Constitutionalism, Liberalism, and the Study of Politics*, in XX NOMOS 8 (1979) ("[T]he capacity for doing public good and engaging in civic education [is] equally the capacity for doing public evil."). This was arguably the dominant viewpoint of the 18th century founders of the American republic, as illustrated in both the Declaration of Independence and the Constitution of 1787. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 604-06, 608-09 (1969). Cf. M. OAKESHOTT, *ON HUMAN CONDUCT* 244 (1975). But see Jones, *The Brooding Omnipresence of Constitutional Law*, 4 VT. L. REV. 1, 1-2 (1979). That the risk of unrestrained government was widely understood to include the power of the judiciary is also likely. See R. BERGER, *GOVERNMENT BY JUDICIARY* 300-11 (1977).

58. For a modern expression of this view, at least as an abstract matter, see Horowitz, Book Review, 86 YALE L.J. 561, 566 (1977) ("Unless we are prepared to succumb to Hobbesian pessimism 'in this dangerous century,' I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good'! It undoubtedly restrains power, but it also prevents power's benevolent exercise."). For an ancient one, see PLATO, *THE STATESMAN* paras. 293-94 (B. Jowett transl.).

The optimistic view of governmental authority, when applied to the government as a whole, includes a faith in the Supreme Court's capacity to formulate appropriate limits to the reach of the activities of government at particular times and in particular circumstances. One having such an outlook will rely principally on the institutional arrangements which have been assumed to yield the optimal definition of governmental power and not, to any substantial degree, on any prior and rigid judgments. This kind of process is most easily accommodated by an open preconstitutional rule.

59. See Cooley, *Comparative Merits of Written and Prescriptive Constitutions*, 2 HARV. L. REV. 341, 349 (1889).

60. CHOPER, *supra* note 2, at 171-259.

61. This discussion is restricted to the relative powers of state and federal governments. In other respects Choper may prefer a more open rule. This may be the case, for example, with respect to adjudication on questions of individual rights. See *id.* at 70-79. The nature of that aspect of the rules, however, is a matter that Choper scrupulously refrains from discussing. See, e.g., *id.* at 122.

other hand, opts for a preconstitutional rule that is considerably more open. He calls for the Court to invalidate any governmental trespass on the explicitly drafted textual provisions of the Constitution,<sup>62</sup> but he would add to those restrictions certain other criteria for validity, less obviously derived from the text, which would direct the Court, in general, to preserve the proper functioning of representative democracy.<sup>63</sup> By including as a test of validity a broad value such as representative democracy, which is both nontextual and capable of drastically differing applications, Ely leaves a large aspect of governmental power—the power to define its own decisionmaking process—without knowable prior limitations. In this respect, Ely's proposal is for an open rule.<sup>64</sup>

It must be re-emphasized that the preconstitutional rule which is, in fact, applied is not, when viewed from the external, critical position of the academic, a question of law, nor could it be. At bottom it rests on a social choice, and is desirable or undesirable only as a matter of judgment or taste concerning the proper relative roles of public and private activity. Moreover, if there is no universally accepted moral or political position on this question, there can be no intrinsically right definition of government. If there is no intrinsically right definition of government there can be no right or wrong preconstitutional rule. In that case, *any* preconstitutional rule, viewed externally, will be arbitrary.<sup>65</sup> This will be equally true of every possible preconstitutional rule along the spectrum from the extremely closed rule to the extremely open one.

### III.

Once it is recognized that no preconstitutional rule, existing or suggested, considered from the external point of view can have any claim to correctness as a matter of law, many standard attitudes toward constitutional adjudication appear in a new light. We might conclude that the absence of any authoritative

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62. ELY, *supra* note 3, at 76–77.

63. *Id.* at 87–88.

64. In this particular respect, Ely's proposal shares a common feature with a school of constitutional scholarship that combines textual proscriptions with limits based on resort to other more or less well-defined values, discoverable by resort to the history, traditions, or morality of society. See text accompanying note 49 *supra*. Two good examples of such proposals are in Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978), and Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265–311 (1973). Such models are to be distinguished from even more open ones incorporating some area of unbounded discretion on the part of the judges similar to that featured in the hypothetical open preconstitutional rule. In contrast these models do not permit decision by reference to personal values. Moreover, their indeterminacy is only in the direction of reducing rather than expanding government power. However, the imprecise nature of the non-textual criteria result in a preconstitutional rule in which the definition of government is to be, in large measure, developed and altered in response to changing times rather than defined at a particular moment in time. It will therefore appeal more to those who prize governmental adaptability and less to those who fear it.

The characterizations of the preconstitutional rules implicit in Ely's and Choper's work illustrate the fact that there is no necessary correlation between the strength and breadth of government power and the open or closed character of the preconstitutional rule. See text accompanying notes 46–48 *supra*. Choper's proposal as to questions of federalism calls for a largely unchecked federal legislature and executive but is properly called a closed rule. Ely's proposals for reinforcing democratic representation promises to substantially restrain the political branches but remains an open rule.

65. See Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1246–48.

standard for resolving our differences about the best preconstitutional rule makes the extensive theoretical academic debate an exercise in futility. I do not believe this to be the case. In fact, there is likely to be a fairly extensive commonality of attitudes toward government among the participants in the discussion. Fruitful argument may proceed on the question of which preconstitutional rule furthers the shared ideal of state power. But certainly in some cases our inability to agree on questions of constitutional law will be a result of our dispute on the proper characteristics of a preconstitutional rule. Those differences will in turn be traceable to fundamentally incompatible views concerning the proper role of government. Once this becomes clear, it makes no sense to continue the argument.

For example, constitutional law teachers can always evoke a laugh by quoting the statement of Justice Roberts in his opinion for the Court in *United States v. Butler*: "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide if the latter squares with the former."<sup>66</sup> If his meaning were as simple—in both senses of the word—as it is often assumed to have been, Justice Roberts would not have gone on, in the same paragraph, to describe the Court's office in performing that duty as a "delicate and difficult" one.<sup>67</sup> It is plain from that recognition, and from the actual decision in *Butler*, that he was speaking a metaphor; he was recognizing the binding force of a substantially closed preconstitutional rule. From the external viewpoint, the wisdom and practicality of such a rule may be challenged, but criticism will have to proceed based on more general beliefs concerning the proper role of government, such as those that have been canvassed. Some such beliefs, however, may not be subject to rational argument. But there is nothing inherently more ridiculous about the rule implicit in Justice Roberts' metaphor than that inferable from the more "sophisticated" essays of Justices Frankfurter or Harlan, or a myriad of academic commentators. In each case the preconstitutional rule is not, in any legal sense, correct or incorrect. Each incorporates a personal judgment about the jobs of government and law.

Justice Roberts' statement reminds us of another critical, and possibly disturbing, aspect of this understanding of preconstitutional rules. It is clear that the Justice was not really arguing for the closed rule. Rather, he was summarizing the directives of a preconstitutional rule that he already took as of binding force. That is to say, he was expressing the internal point of view from which that rule, being axiomatic, was in no need of defense. But it has been shown that this axiom, when examined from the external point of view, will be controversial, even arbitrary. This juxtaposition of the unquestioned

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66. 297 U.S. 1, 62 (1936).

67. *Id.* at 63.

authority of the preconstitutional rule as seen from the internal viewpoint and the fact of its footless nature from the external viewpoint raises two questions. First, can such an artificial proposition in fact control the behavior of judges? Secondly, if the preconstitutional rule does exert such an influence, ought it to do so? Do we want a legal system premised on the uncritical, even blind acceptance of a value-laden and subjective standard?

The first question raises the general issue of the potency of intellectual models in affecting conduct. But if the nature of government and law is in any way within our control, we can only effect our goals through the medium of ideas.<sup>68</sup> Having chosen the kind of limitations we wish to impose on the government, and having chosen independent judges as the ultimate guardians of those limitations, we will need a means of inducing judges to subordinate their critical faculties to the moral and political judgments implicit in the preconstitutional rule. This requires a specification of their mental states. The realist criticism of orthodox legal theory stemmed from a conviction that such control was unlikely to be accomplished by the formulation of abstractions such as legal rules, constitutional, preconstitutional, or otherwise.<sup>69</sup> But it has been shown more than once that this criticism was itself unrealistically incomplete, since it underestimated the extent to which people consciously or unconsciously behave according to abstract rules, whose authority goes largely unquestioned.<sup>70</sup> Indeed, all law involves the attempt to impose, in advance, abstract, fairly orderly, and more or less general demands on what are otherwise random, particular, and concrete instances of human conduct.<sup>71</sup>

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68. See J. NOONAN, *PERSONS AND MASKS OF THE LAW* 4 (1976). It should be clear by now that the force of a preconstitutional rule rests not on its "correctness" but on its acceptance. It has been argued, however, that the society is, in fact, so fractionated regarding preferred values that no agreement could take place, not even the evolving tacit agreement by officials which has been described. See Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1309-20 (1979); Levinson, *The Specious Morality of the Law*, HARPER'S, May 1977, at 38, 39-41. As indicated by the distinction between constitutional and preconstitutional rules, the force of this essay has not been on the content of the constitutional limitations but on the way those limits are identified. Obviously these are related. But it does not follow from the differences among individuals concerning the proper substantive powers of the state that a compromise rule cannot emerge at the more general level of preconstitutional rule. Indeed, every instance of collaborative human endeavor argues otherwise.

Of course, the greater the substantive disagreement on moral issues, the more modest the substantive role that can be assigned to government and the more closed the preconstitutional rule is likely to be. It is hard to believe that there can be no agreement at all (in the sense discussed) on even such a limited government. At this level of argument, proponents of a broader governmental role would seem likely to prefer limited government to a breakdown of the consensus which makes any government at all possible. Although such a government may still generate substantive outcomes that are disagreeable to some people, they may still reason (or intuit) that the advantages of having some legal system outweigh its shortcomings. Any preconstitutional rule will, in this limited area, displace individual moral judgments concerning operative rules of conduct. This fictional or "specious" morality may underlie an effective and useful government. Of course as the realm of government concern is expanded, the frequency and seriousness of the clashes between individual morality will increase and the prospects of lasting agreement will diminish.

69. See J. FRANK, *LAW AND THE MODERN MIND* 140-49 (1963).

70. See H. HART, *THE CONCEPT OF LAW* 134-37 (1961); Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931).

71. The importance of the imposition of abstract order on experience as a feature of law, independent of other instrumental characteristics, suggests that this aspect of law satisfies a basic human need for order and definition. See Leff, *Law and*, 87 YALE L.J. 989 (1978). Cf. R. ARNHEIM, *ENTROPY AND ART* (1971); E. GOMBRICH, *THE SENSE OF ORDER* 1-16 (1979).

Of course, unlike other rules of law which seek to control primary conduct, preconstitutional rules are unaccompanied by the expectation of specific sanction or reward, which may be indispensable to their effectiveness. The extent to which we believe such rules to be effective is finally a matter that can only be decided by reference to each person's own observation of government, knowledge of human history, and intuition regarding human nature. John Maynard Keynes thought economic and political theories have profoundly influenced the course of human government:

Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back . . . [S]oon or late, it is ideas, not vested interest which are dangerous for good or evil.<sup>72</sup>

I do not believe the authority of legal rules has been less powerful.

But granting this, the second question remains. Can we be comfortable with a legal system whose basis is controversial, even arbitrary, and whose existence depends on passing off that basis as the embodiment of a categorical moral truth? Having uncovered the fact that every theory of judicial review is built on a foundation of sand, is there any alternative to "realist despair"?<sup>73</sup> It may not be going too far to say that our enterprise of government limited by law must rest, in the final analysis, on some kind of self-deception, or at least on a standing refusal to inquire too deeply into the basic rationale of the constitutional limits.<sup>74</sup> The preconstitutional rule must be the ultimate reference for constitutional adjudication, although it might appear foolish or even pernicious when examined on its own merits against a general criterion of political morality.<sup>75</sup>

Of course, it has been one of my main purposes in this essay to stress the importance of exactly such external criticism of the preconstitutional rule. Theoretical constitutional commentary, among other factors, can lead to changes in that rule. But the fictional aspects of acceptance of the preconstitutional rule are ineradicable in any working system of constitutional government. This should not be thought remarkable. The pivotal place of abstract and uncertain ideas in law is far from unusual. To submit to their force is

72. J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 383-84 (1936).

73. See Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.

74. See Perry, *Contested Concepts and Hard Cases*, 88 ETHICS 20, 35 (1977) (possible utility of judges holding mythical belief that there is a uniquely correct solution to every case). This is not to say that at a more general level a judge might not consciously decide to subordinate his own moral convictions or preferences to the preconstitutional rule. See Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 844-45 (1931). Such action may be appropriate in a rule-utilitarian sense. See Kay, Book Review, 12 HARV. C.R.-C.L.L. REV. 219 (1977).

75. In its extremely limited realm, therefore, the preconstitutional rule takes on the attributes of God as an objective, unimpeachable source of right and wrong. See Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1246-49. Naturally, however, no preconstitutional rule that is antagonistic to values which are both important and widely shared will be able to survive. See T. MORAWETZ, *THE PHILOSOPHY OF LAW* 26-27 (1980).

neither futile nor demeaning.<sup>76</sup> Most of human history is nothing more than the interaction of the physical facts of the world and the purposive and creative use of human intelligence. Wallace Stevens, for example, made a central point in his work of the inseparability of reality and imagination in creating human experience.<sup>77</sup> In most every endeavor we must proceed on the basis of manufactured assumptions that cannot be grounded in any unshakable truth. Stevens summarized this necessity by saying that "final belief [m]ust be in a fiction."<sup>78</sup> It is not a failing of the law that our constitutional government must rest finally on a chosen fiction. In law and elsewhere, we attempt to shape the unruly facts of the world and of our natures into such forms as will best serve our own purposes. In that attempt we have no weapons, no tools, and no constraints but the fallible products of our own minds.

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76. Professor Gilmore has eloquently warned us that "[t]he quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse." G. GILMORE, *THE AGES OF AMERICAN LAW* 100 (1977). With respect to the behavior of judges, we may agree that certainty is an "illusion" without conceding that it is a curse. In fact, the illusion of certainty may be a precondition of effective law.

77. See R. BLESSING, WALLACE STEVENS' *WHOLE HARMONIUM* 168-72 (1970). In one of his best known poems Stevens sounded this theme clearly in describing a solitary singer walking along the shore at twilight.

It was her voice that made  
The sky acutest at its vanishing,  
She measured to the hour its solitude,  
She was the single artificer of the world  
In which she sang. And when she sang, the sea,  
Whatever self it had, became the self  
That was her song, for she was the maker. Then we,  
As we beheld her striding there alone,  
Knew that there never was a world for her  
Except the one she sang and, singing, made.

Stevens, *The Idea of Order at Key West*, in *THE PALM AT THE END OF THE MIND: SELECTED POEMS AND A PLAY* 98 (1971). I cannot believe it is entirely coincidental that Stevens was also a lawyer. S. WESTON, WALLACE STEVENS: AN INTRODUCTION TO THE POETRY 1 (1977).

Bernard Williams suggests that setting about on a project of acquiring a belief without regard to its truth may in certain cases "not seem evidently incoherent" but it is "deeply irrational, and . . . most of us would have a very strong impulse against engaging in a project of this kind however uncomfortable these truths were which we were living with." B. WILLIAMS, *PROBLEMS OF THE SELF* 150 (1973). See Wiggins, *Freedom, Knowledge, Belief and Causality*, in *KNOWLEDGE AND NECESSITY* 144-45 (Vesey ed. 1970). The problem with this kind of chosen belief is, at least in part, that preserving it, in the light of continuous clashes with contradictory reality will require a never-ending chain of new false beliefs that could tend to "total destruction of the world of reality, to . . . paranoia." B. WILLIAMS, *PROBLEMS OF THE SELF* 151 (1973). But Mark Fisher has pointed out there are, at least, some kinds of belief—belief in the hereafter, for example—which will not have to confront these challenges from reality. See Fisher, *Truth as a Problem for Utilitarianism*, 89 *MIND* 249 (1980). The authority of the preconstitutional rule may be such a case. Moreover, as should now be clear, the "truth" of the force of a rule of law is what we want it to be. A preconstitutional rule is nothing more than a shared choice of the officials of a government about the scope of that government's authority.

78. Stevens, *Asides On the Oboe*, in *THE PALM AT THE END OF THE MIND: SELECTED POEMS AND A PLAY* 187 (1971).

